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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Finance Docket No. 35305

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ARKANSAS ELECTRIC COOPERATIVE CORPORATION  
PETITION FOR DECLARATORY ORDER

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REPLY COMMENTS OF  
CSX TRANSPORTATION, INC.

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Of Counsel:

ENTERED  
Office of Proceedings

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Part of  
Public Record

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Dated: April 30, 2010

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**Introduction**

CSX Transportation, Inc. ("CSXT") submits these Reply Comments in accordance with the Board's December 1, 2010 order instituting this declaratory order proceeding. Although CSXT takes no position on the reasonableness of the specific tariff provisions at issue in this proceeding, CSXT submits these comments to urge the Board to avoid certain logical errors urged by some parties in their opening comments. The Board should resolve this fact-specific case without unduly limiting rail carriers' future discretion to adopt appropriate tariff provisions as the industry's knowledge base grows.

CSXT is a Class I freight railroad based in Jacksonville, FL. CSXT operates in 23 eastern states, the District of Columbia and Canada, and it provides transportation services to thousands of customers shipping over two thousand different commodities in any given year. CSXT views the substantive accumulation of coal dust issue presented in this proceeding as an issue unique to the West due to the qualities of the coal mined in the

Powder River Basin, and the density of traffic on the Joint Line.<sup>1</sup> CSXT has, however, established and published numerous common carrier rates, conditions of carriage, rules, and operating requirements that govern shipments on its network. None of these requirements currently relate to accumulated coal dust, but many are essential to safety and efficient rail operations. Yet, certain arguments made in various opening comments, if carried to their logical extension, could threaten to undermine the safety and efficiency enhancements that these kinds of requirements bring to CSXT's operations. CSXT asks the Board, as it resolves the disputes in this proceeding, to ensure that railroads retain their statutory right<sup>2</sup> to adopt and implement reasonable tariff provisions requiring the adoption of new technologies and practices to continue to enhance the safety and efficiency of railroad operations.

### **Discussion**

CSXT submits these Reply Comments to highlight three issues that we feel the Board should consider in this proceeding. First, CSXT encourages the Board to avoid giving undue preference to prior practices. Second, CSXT reiterates the need for the Board to carefully consider the operational implications identified by the other Class I railroads. Third, CSXT encourages the Board to carefully consider the rights of the railroads as property owners with common law rights in addition to the rights and obligations established in the ICC Termination Act.

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<sup>1</sup> Thus, CSXT's statement that shoulder ballast cleaning is sufficient maintenance to mitigate coal dust risk in its current dispute with Seminole Electric is irrelevant, and cannot stand for the principle for which it is cited by Texas Municipal Power Agency. Texas Municipal Power Agency, *Opening Evidence and Arguments of the Texas Municipal Power Agency*, at 4.

<sup>2</sup> 49 U.S.C. § 10702(2)

**A. The Board should not give undue weight to past practice.**

Several comments urging the Board to find the BNSF Railway Company (“BNSF”) rules unreasonable give undue emphasis to the fact that coal has traditionally been transported in open-top railcars, without taking precautions to limit the emission of coal dust.<sup>3</sup> Indeed, in its Opening Statement, TUCO, Inc. goes on at length about how it hopes the Board will view this historical practice:

Coal has been safely and efficiently transported in open top gondola railcars for nearly 200 years in all sorts of weather conditions without the need for coal dust emission standards. **Given the long term *status quo* in the rail transportation industry**, BNSF should be required to demonstrate in this proceeding why periodic maintenance of the Joint Line and other tracks on BNSF's system should not still be sufficient to mitigate the adverse effects of coal dust deposits BNSF claims.

TUCO, Inc., *Opening Statement of TUCO, Inc.*, at 4 (emphasis added). CSXT urges the Board to decisively reject this effort to glorify technological inertia and incorporate it into the determination of reasonableness. Adopting beneficial changes in technology or practices should not be unduly hampered by obsolete past practice. Each proposed rule or practice should be assessed on its own merits.

**B. The Railroads must be able to adjust their rules and practices to changing circumstances**

The Opening Comments of the BNSF, Union Pacific Railroad Company (“UP”), and Norfolk Southern Railway Company (“NS”) all underscore the dynamic nature of rail transportation, and the need for railroads to continuously refine their operating rules to maintain and enhance the safety and efficiency of rail operations. CSXT faces similar

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<sup>3</sup> See, e.g., Western Coal Traffic League and Concerned Captive Coal Shippers, *Opening Evidence and Argument of Western Coal Traffic League and Concerned Captive Coal Shippers*, at 14, Ameren Energy and Fuels Service Company, *Opening Evidence and Argument of Ameren Energy and Fuels Service Company*, at 2-3.

challenges on a daily basis, and works diligently to find new technologies and practices that can make its rail operations safer and more efficient. We urge the Board to support that flexibility in practice by clarifying that the rules adopted by a railroad are effective, absent a finding by the Board that they are unreasonable.<sup>4</sup> The Board must reject the suggestion that the Board must determine a rule is reasonable before it goes into effect.<sup>5</sup>

**C. The Board should give appropriate weight to BNSF's rights as a property owner**

Although mentioned only briefly by BNSF,<sup>6</sup> CSXT believes that BNSF's rights as a property owner factor substantially in the determination of reasonableness. Absent the confusion created by the regulatory overlay, BNSF's position is unassailable. BNSF has decided that, for a variety of safety and operational reasons, it will reduce or limit the accumulation of coal dust on its track structure and related land. It is difficult to conceive of objections a customer might reasonably make to that decision. CSXT knows of no inherent right on the part of a customer to leave an unrestricted portion of its property on its supplier's land. BNSF may once have accepted the fact that significant quantities of coal dust would be deposited on its property, but basic property law teaches that it need refrain from imposing restrictions indefinitely.

CSXT believes this necessarily factors into the Board's determination of what is reasonable. CSXT has an active program to prevent littering on its properties, and

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<sup>4</sup> 49 U.S.C. §§ 10702(2), 10704(a)(1)

<sup>5</sup> See, American Public Power Association, Edison Electric Institute, and National Rural Electric Cooperative Association, *Initial Comments of American Public Power Association, Edison Electric Institute, and National Rural Electric Cooperative Association*, at 6 ("But APPA, EEI, and NRECA firmly believe that there are too many uncertainties associated with this matter to permit a Tariff, which of course has the force and effect of law, to go into effect until the STB is convinced that the Tariff is reasonable, is clear with respect to the parties' obligations, will not impose wasteful and unnecessary obligations on shippers and on essential transportation, is the most cost-effective approach to the problem, and will not produce other unanticipated problems." (emphasis added))

<sup>6</sup> BNSF Railway Company, *BNSF Railway Company's Opening Evidence And Argument*, at fn 1

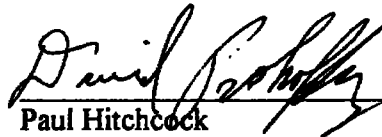
regularly seeks compensation from those identified as having dumped unwanted goods on CSXT's land. To protect the property rights of railroads and the safety of rail operations, the complainants must demonstrate that BNSF's proposed rule's harms significantly outweigh the rule's benefits before depriving BNSF of its right to limit the excessive accumulation of coal dust on its land.

### **Conclusion**

CSXT trusts that the Board will carefully consider the technical issues that are a part of the record in this matter. These technical issues are unique to the west and CSXT expresses no opinion on the technical merits.

CSXT urges the Board to properly balance the merits of BNSF's new rules against objections. In doing so, the Board should reject the argument that "it's always been done this way." That path leads to stagnation and could impede future railroad efforts to improve safety. Similarly, the Board should give deference to the railroad's statutory right to establish and implement rules unless proven unreasonable. All the while, the Board should give fair weight to BNSF's basic property rights as a land owner.

Respectfully Submitted,



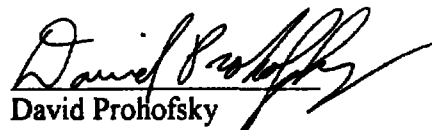
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April 30, 2010

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of April, 2010, I caused copies of the Reply Comments of CSX Transportation, Inc. to be served by first-class mail or more expeditious means on all Parties of Record in STB Finance Docket No. 35305.

  
David Prohovsky